KELANA ERAT SDN BHD

v.

NICHE PROPERTIES SDN BHD & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[ORIGINATING SUMMONS NO: 24NCC(ARB)-43-11-2011
& 24NCC(ARB)-50-12-2011]
3 MAY 2012

ARBITRATION: *Award - Clarification - Whether Arbitration Act 2005 or UNCITRAL Rules provide for "clarifications" of an award*

ARBITRATION: *Award - Enforcement - Application for - Matters raised in defendant's affidavit unconnected to statutory grounds for refusing recognition or enforcement - Whether application for enforcement allowed - Arbitration Act 2005 s. 39*

ARBITRATION: *Award - Setting aside - Grounds for - General allegations without proof - Whether award beyond scope of submission to arbitration - Whether award final and binding - Whether award could be set aside - Arbitration Act 2005, s. 37(1)(a)(i), (ii), (iii), (iv) & (b)*

Kelana Erat Sdn Bhd applied by way of originating summons to enforce an arbitration award ('the Award') under s. 38(1) of the Arbitration Act 2005 ('the Act') whilst Niche Properties Sdn Bhd applied by way of a separate originating summons to set aside the Award. Both suits were heard together. The disputes between the parties giving rise to the arbitration arose out of a Joint Venture Agreement ('JVA') entered into between the parties for the construction and development of a piece of land. The claimant in the arbitration was Kelana Erat whilst the respondent was Niche Properties. In its application to set aside the Award, Niche Properties contended that (i) the Award contained decisions on matters beyond the scope of submission to the arbitration and/or not falling within the terms of the submission to the arbitration; (ii) the arbitrator's observation on whether the JVA was a partnership was both misleading and confusing; (iii) the finding of the arbitrator that there had been a breach of trust on the part of Niche Properties with respect to the utilisation of the balance monies left in the HDA Account was wrong; (iv) there was an

A error on the face of the Award and as such the Award must be set aside; (v) there was the public policy ground under s. 37(1)(b) of the Act upon which the Award should be set aside; and (vi) based on its inherent powers, the court should set aside the Award. Kelana Erat contended that Niche Properties' B application should be dismissed on the grounds that it had not set out the facts leading to the grounds in a concise manner within the spirit and intent of the relevant sub-section of s. 37 of the Act.

C **Held (dismissing Niche Properties' application to set aside the Award; allowing Kelana Erat's application for enforcement):**

(1) An award of the arbitrator made under the Act is for all intents and purposes final and binding. It is by and large immune from any interference by a court, much less to set it D aside unless it is infected with the infirmities identified in s. 37(1)(a)(i) to (vi) and 37(1)(b) of the Act. (paras 13 & 14)

(2) Niche Properties' originating summons and supporting affidavit had merely made general allegation without providing any E proof whatsoever as expressly provided in s. 37(1)(a) of the Act. It regurgitated the relevant sub-sections of s. 37(1) without providing any proof thereof. The court only had a better inkling of the actual proof by reading the written submission of learned counsel for Niche Properties. The court F was minded to dismiss Niche Properties' application to set aside the Award on this ground alone of not furnishing proof *via* affidavit evidence. (para 18)

(3) Whilst the JV was not a partnership, it was the arbitrator's G findings that for the limited purpose of Income Tax submission, Form P was to be filed by Niche Properties unless it obtained a ruling from the Inland Revenue Department that this need not be done. The arbitrator's findings could not be castigated as being confusing and indecisive and hence there H was no reason to interfere with the arbitrator's findings. (para 28)

(4) As the dispute of necessity revolved around accounting treatment, the arbitrator was perfectly entitled to make a finding of breach of trust if the facts were patent on the face I of it. It could not be said that the Award had dealt with a dispute not contemplated by or not falling within the terms of

the submission to arbitration or that the award contained decisions on matters beyond the scope of the submission to arbitration within the meaning of s. 37(1)(a)(iv) and (v) of the Act. (para 34)

(5) The expression "error on the face of the award" and the corresponding concept of "misconduct" belong to the old regime under the Arbitration Act 1952. Under the new regime of the Arbitration Act 2005, one must come within one of the grounds identified in s. 37(1)(a)(i) to (vi). Even assuming for a moment that the test of error on the face of the award was still applicable, Niche Properties had failed to identify these so-called errors (*Crystal Realty Sdn Bhd v. Tenaga Insurance (Malaysia) Sdn Bhd;* refd). (para 38)

(6) There was nothing against public policy for the arbitrator to adjudicate on the rights of the parties under the JVA even though the subject matter had to do with a housing development project. It is not unknown for a developer to suffer winding-up before completion of its housing project and the liquidator appointed will assess the viability of continuing to complete the project. It was too far-fetched to say that to have a winding-up order made against a developer before it completes its housing project is contrary to public policy. (paras 42 & 43)

(7) The reliance on the inherent power of the court was misplaced and not applicable. The legislature by the Act has provided for specific statutory criteria which Niche Properties had failed to meet in attempting to set aside the Award. Hence, there was no basis to resort to inherent powers (*Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors;* refd). (paras 46 & 49)

(8) The issue of "clarifications" sought by Niche Properties was totally misplaced as there is no provision in the Act or the UNCITRAL Rules which provides for "clarifications" of an award (*Teong Piling Co v. Asia Insurance Co Ltd;* refd). (para 52)

(9) None of the matters raised from the defendant's affidavit had any connection to the statutory grounds in s. 39 of the Act for refusing recognition or enforcement. (para 61)

Case(s) referred to:
AJT v. AJU [2010] 4 SLR 649 ***(refd)***
Crystal Realty Sdn Bhd v. Tenaga Insurance (Malaysia) Sdn Bhd [2008] 3 CLJ 791 CA ***(refd)***
Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244 SC ***(refd)***
Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd [2010] 5 CLJ 83 HC ***(foll)***
Teong Piling Co v. Asia Insurance Co Ltd [1994] 2 CLJ 662 HC ***(refd)***

Legislation referred to:
Arbitration Act 1952, s. 2
Arbitration Act 2005, ss. 8, 9(1), 35(1)(a), (b), 36(1), 37(1)(a)(i), (iv), (v), (b)(ii), (2), (7), 38(1), (2), 39(1)(a)(i), (ii), (iii), (iv), (v), (vi), (vii), (b)
Income Tax Act 1967, s. 2
Rules of the High Court 1980, O. 92 r. 4

Other source(s) referred to:
Sundra Rajoo & WSW Davidson, *The Arbitration Act 2005, UNCITRAL Model Law as applied in Malaysia*, 2007, pp 165, 183

(Case No: 24NCC(ARB)-43-11/2011)
For the plaintiff - Ramdas Tikamdas; M/s Siva, Ram & Assocs
For the defendant - Reventharen Suppiah (VB Jayanthi with him); Reventharen & Assocs

(Case No: 24NCC(ARB)-50-12/2011)
For the plaintiff - Reventharen Suppiah (VB Jayanthi with him); Reventharen & Assocs
For the defendant - Ramdas Tikamdas; M/s Siva, Ram & Assocs

Reported by Amutha Suppayah

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] As is so often the case, when a losing party is dissatisfied with an award of an arbitrator, that party will apply to set aside the award. That is often met with the winning party applying to register and enforce the award. This was what happened here and as the issues straddled both applications, by agreement of counsel of both parties both the applications were heard together.

Parties

[2] The disputes between the parties giving rise to the arbitration arose of out a Joint Venture Agreement ("JVA") dated 14 October 2002 entered into between Kelana Erat Sdn Bhd ("Kelana Erat") and Niche Properties Sdn Bhd ("Niche Properties") for the construction and development of that land held under H.S. (D) 289962, PTB 20492, Bandar Johor Bahru, Daerah Johor Bahru comprising an area about 23.69 acres for a mixed housing and commercial development project ("the said project").

[3] The arbitration is a domestic arbitration and the seat of arbitration is Malaysia.

[4] The learned arbitrator, Mr. Vinayak Pradhan, published a partial award dated 30 April 2011 which was received by the claimant on 6 May 2011 (exh. "A3"). At para. 174 of the award, the arbitrator held that the same was "final as to the matters contained in it."

[5] Thereafter upon hearing the issue of costs, the learned arbitrator made a final award dated 27 October 2011. The said final award relating to costs is in "exh. A4".

Problem

[6] The claimant in the arbitration is Kelana Erat. The respondent is Niche Properties. The reliefs and remedies sought by the claimant are as set out in para. 10 of the of the partial award as follows:

> 10.1 A declaration that the Respondent has breached and or contravened the Joint-Venture Agreement dated 14 October 2002 in failing, refusing and/or neglecting:
>
> (a) to cause a representative of the Claimant to be joint-signatory of the Housing Developer's Account ("HDA") maintained by the Respondent for the Project;
>
> (b) to ensure that the Project Management Committee ("PMC") shall meet at least once a month and further to report to the Claimant the progress of the project on a quarterly basis;
>
> (c) to forward to the Claimant or to the Claimant's representative in the PMC, for approval and adoption, statements issued by the auditor in respect of the profit before and after tax;

A (d) to consult or obtain the consent of the Claimant for the preparation of the Joint Development Accounts for the respective years by the Accountant.

10.2 An Order that the Respondent forthwith do:

B (a) cause a representative of the Claimant to be a joint-signatory of the HDA maintained by the Respondent for the Project;

(b) ensure that the PMC shall meet at least once a month and further to report to the Claimant the progress of the Project on a quarterly basis;

C (c) forward to the Claimant or to the Claimant's representative in the PMC, for approval and adoption, statements issued by the auditor in respect of the Joint Development Accounts for each financial year;

D (d) give full access to an Accountant appointed by the claimant all accounting records and documents including receipts, vouchers, invoices, Bank Statements and ledgers in respect of the Monthly Management Accounts and Joint Development Accounts from the year 2004 and yearly thereafter until final completion of the said Project and distribution of profits between the Claimant and the Respondent.

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10.3 A declaration that for the purpose of the Joint Development Accounts between the Claimant and the Respondent for the distribution of profits:

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(a) the cost of the Project Land is RM7,741,000 and not the sum of RM10,000,000;

(b) all interest, commission, charges, costs, fees and expenses in relation to the financing of the Project including the bridging loan shall be deleted therefrom and be borne solely by the Respondent.

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10.4 An Order that the Respondent do forthwith cause the correction in the Joint Development Accounts for the financial periods ending 31 December 2004, 31 March 2006, 31 March 2007, 31 March 2008 and all subsequent financial periods by:

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(a) deleting the cost of the Project Land of RM10,000,000.00 and substituting the sum of RM7,741,000.00 only;

I (b) deleting the whole sum of interest charges amounting to the cumulative sum of RM6,043,024.00 as at 31 March 2008;

(c) deleting all the costs, fees and expenses and other charges amounting to RM4,216,905.51;

(d) deleting all other sums wrongfully debited therefrom;

(e) re-assessing the profit distribution between the Claimant and the Respondent and accordingly to determine the Claimant's share of profit after tax for Phase 1 amounting to RM5,417,191.49.

10.5 A declaration that the Joint Development Accounts for the periods ending 31 December 2004, 31 March 2006, 31 March 2007 and 31 March 2008 do not represent a true and fair view of the state of affairs of the Joint Development Account.

10.6 An order that all necessary accounts and inquiries be taken and made for the proper distribution of the Total Net Profit After Tax derived from the development and sales of the Project on the basis of 35% for the Claimant and 65% for the Respondent in respect of Phase 1 of the Project and an order for distribution of the same.

10.7 A declaration that the Respondent is liable to pay to the Claimant the administrative expenses of RM20,000.00 per month and any unutilized amount be credited to the Claimant at the end of every consecutive period of twelve (12) months from the commencement date 1 December 2002.

10.8 An order that the Respondent forthwith pay to the Claimant the outstanding sum of RM585,297.33 as at 30 September 2009 being the administrative expenses from the year 2002 to 31 September 2009 and with interest thereon at 8% per annum from 1 October 2009 until full payment thereof; and continuing monthly thereafter at RM20,000.00 per month from 31 October 2009 till the date of the Awards and to proceed monthly thereafter at RM20,000.00 per month until completion of the Joint Venture between the Claimant and the Respondent.

10.9 Damages to be assessed.

10.10 Interest thereon at 8% per annum from such date deemed just to date of payment.

10.11 Costs

10.12 Such further and other reliefs deemed just. In this respect an order that the Respondent do file Form P as prescribed in the Income Tax Act 1967 in respect of the Joint Development Accounts for the housing development in Larkin, Johor Bahru commencing 1 April 2002 until completion of the Joint Venture between the Claimant and the Respondent.

[7] The respondent counterclaimed the following as set out in para. 11 of the partial award:

(i) RM33,504,173.45;

(ii) Interest thereon at 8% per annum from date of counterclaim to the date of full realization of payment;

(iii) Costs.

[8] The learned Arbitrator had set out in para. 12 of the partial awards the respondent's claims as follows:

> 12.1 In breach of Clause C of the Supplement Agreement dated 23 June 2005, the Claimant misled the Respondent to believe that the final total amount of pre-development expenses amounted to RM1,548,959.74. The pre-development expenses paid by the Respondent was RM1,735,034.04, the sum of RM186,074.30 was paid by the Respondent in excess. This is claimed.
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> 12.2 Pursuant to the J.V. Agreement dated 14 October 2002, the Claimant represented, warranted and undertook to deliver the said Project Land free from encumbrances. In breach of contract, the said Project Land was not free from encumbrances.
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> (i) By reason of such breach the Respondent incurred cost for the relocation of Nursery in the sum of RM264,098.85
>
> 12.3 Wrongfully, and in further breach, the Claimant refused to execute the loan documentation for the facility from Ambank (M) Sdn Bhd via the Letter of Offer dated 26 July 2007 for the development of Phase 2. The Claimant's wilful refusal caused the facility to be terminated via the Letter of Termination dated 8 January 2008. This resulted in works in Phase 2 to be stopped and the Respondent incurring the Monthly Operating Expenses costs of:
>
> (i) Each party's entitlement of RM20,000.00: RM40,000.00 from January 2008 - June 2009 (18 months x RM60,000.00) = RM1,080,000.00
>
> (ii) Site Office Expenses from January 2008 - June 2009 (18 months x RM11,000.00) = RM198,000.00
>
> (iii) Sales Office Expenses from January 2008 - June 2009 (18 months x RM22,000.00) = RM396,000.00

12.4 The Claimant's breach caused the Respondent to suffer consequential loss of profit on Phase 2 calculated based on the Development Budget. The Respondent claims RM18,5000,000.00.

12.5 The interest of 8% per annum calculated on the outstanding loan sum of RM24,000,000.00 owing to the Respondent by the said Project pursuant to the J.V. Agreement dated 14 October 2002 (RM24,000,000.00 c 1.5 years) is RM2,880,000.00.

12.6 In breach of the Claimant's obligations and responsibilities in good faith and equitably, the Respondent has been subjected to embarrassment, humiliation and loss of reputation having to refund the purchasers of houses in Phase 2 of the said Project. The embarrassment and humiliation suffered by the Respondent is incalculable.

12.7 The value of the Respondent's loss of reputation is very great indeed, and the Respondent seeks compensation of RM 10,000,000.00 for social undermining.

Prayer

[9] In Originating Summons No. 244NCC (ARB) 43/12/2011, Kelana Erat as the plaintiff has applied for leave to enforce the awards of the arbitrator dated 30 April 2011 and 27 October 2011 in favour of Kelana Erat and that the awards be enforced by entry as a judgment in terms of the awards.

[10] Meanwhile in Originating Summons No. 24NCC (ARB) 50/12/2011, Niche Properties as the plaintiff has applied to set aside the whole of the partial award dated 30 April 2011 and the final award dated 27 October 2011 under s. 37 of the Arbitration Act 2005 and in particular under s. 37(1)(a)(iv), 37(1)(a)(v), 37(1)(b)(ii) and or under the inherent powers of the court.

[11] Initially there was also an additional prayer under s. 37(7) of the Arbitration Act 2005 for an order that any money made payable by the award shall be brought into the High Court or otherwise secured pending the determination of the application. This prayer was later withdrawn by learned counsel for Niche Properties on ground that there was no necessity for it as the two applications are being heard together.

[12] For completeness, the reliefs and remedies awarded by the learned arbitrator in the partial award are as follows at pp. 64-67 of the partial award:

A. I Declare that the Respondent has a contractual obligation:

a. to cause a representative of the Claimant to be a joint-signatory of the Housing Developer's Account ("HDA") maintained by the Respondent for the Project;

b. to ensure that unless otherwise agreed by the parties that the Project Management Committee ("PMC") shall meet at least once a month and further to report to the Claimant the progress of the project on a quarterly basis;

c. to forward to the Claimant or to the Claimant's representative in the PMC for approval and adoption, statements issued by the auditor in respect of the profit before and after tax;

d. to consult or obtain the consent of the Claimant for the preparation of the Joint Development Account for the representative years by the Accountant.

B. I Order that the Respondent do within 60 days of the date of this Award:

e. cause a representative of the Claimant to be joint-signatory of the Housing Developers Account maintained by the Respondent for the Project, subject to the Claimant accepting any terms the bank may impose in this regard;

f. ensure that, unless otherwise agreed to by the parties, the PMC shall meet at least once a month and report to the Claimant the progress of the Project on a quarterly basis;

g. forward to the Claimant or to Claimant's representative in the PMC for approval and adoption, statements issued by the auditor in respect of the Joint Development Accounts for each financial year;

h. give reasonable access, on a request made by the Claimant with adequate notice, to an Accountant appointment by the Claimant to all accounting records and documents including receipts, vouchers, invoices, Bank Statement and ledgers in respect of the Monthly

Management Accounts and Joint Development Accounts from the year 2004 and yearly thereafter until final completion of the said Project and the distribution of profits between the Claimant and the Respondent.

C. I Declare that for the purpose of the Joint Development Accounts between the Claimant and the Respondent for the distribution of profits:

i. the cost of the Project Land is RM7,741,000.00 and not the sum of RM10,000.000.00;

j. all interest, commission, charges, costs, fees and expenses in relation to the financing of the Project including the bridging loan shall be deleted therefrom and be borne solely by the Respondent.

D. I Order that the Respondent do forthwith cause the correction in the Joint Development Accounts for the financial periods ending 31 December 2004, 31 March 2006, 31 March 2007, 31 March 2008 and all subsequent financial periods by:

k. deleting the cost of the Project land of RM10,000,000.00 and substituting the sum of RM7,741,000.00 only;

l. deleting the whole sum of interest charges amounting to the cumulative sum of RM6,043,024.00 as at 31 March 2008;

m. substituting the sum of RM4,216,905.51 for the costs fees and expenses and other charges made to various authorities by a figure arrived by deducting the total of payments made under clause 6.1 for outgoings incurred after 14 October 2002, such outgoings to be determined by me in the event the parties cannot agree to them.

E. I Declare that the Joint Development Accounts for the periods ending 31 December 2004, 31 March 2006, 31 March 2007 and 31 March 2008 do not represent a true and fair view of the state of affairs of the Joint Development Account.

F. I Declare that the Respondent is liable to pay to the Claimant the administrative expenses of RM20,000.00 per month and any unutilized amount be credited to the Claimant at the end of every consecutive period of twelve (12) months from the commencement date 1 December 2002.

A

G. I order that the Respondent forthwith pay to the Claimant the outstanding sum of RM446,237.40 being the outstanding administrative expenses until 31 December 2008 and monthly thereafter at RM20,000.00 per month from 1 January 2009, with any unutilized balance being paid at the end of each calendar year from 2009 until completion of the Joint Venture between the Claimant and the Respondent. I Order interest until the date of payment to be paid at 4% p.a. on the sum of 446,237.40 from 1 January 2009 as well as on any outstanding sums due but not paid for each year commencing the end of 2009.

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H. I order that damages be assessed.

I. I order that the Respondent provide the Claimant with copies of all income tax returns filed in respect of the development of the Project Land and further Order that the Respondent file Form P as prescribed in the Income Tax Act 1967 in respect of the Joint Development Accounts for the housing development in Larkin, Johor Bahru commencing 1 April 2002 until completion of the Joint Venture between the Claimant and the Respondent, unless it obtains a ruling from the Inland Revenue Department that this need not be done.

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J. I order that the counterclaim be dismissed save for the claim in respect of the relocation of the nursery in respect of which I Order that damages be assessed.

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K. I order that the Respondent pay the Claimant its costs of prosecuting its claim as well as the costs relating to its defence of the counterclaim except those relating to the removal of the nursery to which the Respondent is entitled. The parties are to attempt to agree as to costs failing which I shall, on application being made to me, determine the quantum of costs.

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L. Any matters not dealt with in this Partial Award will be dealt with in a future or Final Award.

Principle

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Setting Aside An Award

[13] An award of the arbitrator made under the Arbitration Act 2005 is for all intents and purposes final and binding. Section 36(1) provides that:

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> An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set-off or otherwise in any proceedings in any court.

[14] It is by and large immune from any interference by a court, much less to set it aside unless it is infected with the infirmities identified in s. 37(1)(a)(i) to (vi) and 37(1)(b) of the Arbitration Act 2005.

[15] Section 37(1) and (2) provide as follows:

> (1) An award may be set aside by the High Court only if:
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> (a) the party making the application provides proof that:
>
> (i) a party to the arbitration agreement was under any incapacity;
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
>
> (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
>
> (v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or
>
> (vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or
>
> (b) the High Court finds that:
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia;
>
> or
>
> (ii) the award is in conflict with the public policy of Malaysia.

A (2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where:

(a) the making of the award was induced or affected by fraud or corruption; or

B (b) a breach of the rules of natural justice occurred:

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

C **[16]** When read together with the prior provision of s. 8 which states that "Unless otherwise provided, no court shall intervene in any of the matters governed by this Act" it would appear that there is a palpable paradigm shift and a discernible difference where arbitration under the 2005 Act is concerned compared to D the Arbitration Act 1952 in that the court would tend to take a hands-off approach and would only intervene on matters specifically set out in s. 37 where setting aside an award is concerned.

E *Whether The Affidavit Of Niche Properties Disclosed Proof Of The Matters Referred To In s. 37(1)(a) Of The Arbitration Act 2005*

[17] Learned counsel for the claimant, Kelana Erat, Mr Ramdas Tikamdas submitted that upon a perusal of the plaintiff's originating summons to set aside the arbitrator's partial award and F final award, the same should be dismissed *in limine* on the ground that the plaintiff had not set out the facts leading to the grounds in a concise manner within the spirit and intent of the relevant sub-section of s. 37 of the Act.

G **[18]** As can be seen in Niche Properties' originating summons and supporting affidavit, it had merely made general allegation without providing any proof whatsoever as expressly provided in s. 37(1)(a) of the Act. The general allegations by the plaintiff in its supporting affidavit are now set out:

H 8. I am advised by my solicitors and verily believe that the awards stated above contain an error of law on the face of the record.

9. I am advised by my solicitors and verily believe that the I arbitrator had exceeded his jurisdiction in handing down the awards stated above.

10. I am advised by my solicitors and verily believe that the Awards stated above deal with a dispute not contemplated by or not falling within the terms of the submission to the arbitrator.

11. I am advised by my solicitors and verily believe that the awards above contain decision on matters beyond the scope of the submission to arbitration.

12. I am advised by my solicitors and verily believe that the awards above are in breach of the rules of natural justice.

13. I am advised by my solicitors and verily believe that the awards above are in conflict with the public policy of Malaysia.

[19] As can be seen it is regurgitating the relevant sub-sections of s. 37(1) without providing any proof thereof and this court only had a better inkling of the actual proof by reading the written submission of learned counsel for Niche Properties. The opening sentence of s. 37(1)(a) reads:

> An award may be set aside by the High Court only if:
>
> (a) The party making the application **provides proof that-** (emphasis added).

[20] I am in total agreement with the dicta of His Lordship Hamid Sultan JC (as His Lordship then was) in *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83 at p. 100:

> ... The AA 2005 does not permit the court to intervene in matters which does not strictly fall within any of sub-section of s. 37. In consequence general allegations are not sufficient as it is mandatory requirement for the need of proof. For example, in this case the plaintiff alleges breach of rules of natural justice without setting out the prejudice suffered and proof thereof ... General complaint of breach of natural justice *per se* in this time and era will stand as an embarrassing plea ...

[21] Whilst I am minded to dismiss Niche Properties application to set aside the partial award on this ground alone of not furnishing proof *via* affidavit evidence, I nevertheless have proceeded to consider the grounds as stated in the written submission of learned counsel for Niche Properties.

A *Whether The Award Should Be Set Aside Under s. 37(1)(a)(iv) And (v) Of The Arbitration Act 2005*

[22] In respect of s. 37(1)(a)(iv) and (v), learned counsel for Niche Properties, Mr R Suppiah, submitted that the awards
B contained decisions on matter beyond the scope of submission to the arbitration and/or not falling within the terms of the submission to the arbitration. He contended that in particular the arbitrator's observation whether this Joint Venture Agreement is a partnership is both misleading and confusing.

C **[23]** The arbitrator at para. 39 of the partial award had ruled that the JV is not a partnership, "...There can be no dispute about this..." and fully acknowledged that cl. 9 clearly says so. The learned arbitrator then went on to say "... Apart from cl. 9 joint
D ventures are not in law regarded as partnership ...". The arbitrator went on further to emphasise that the claimant plays a very minor role in the development project.

[24] The arbitrator's finding that the JV is not a partnership must be set out *in extenso* so that we see the clarity of the learned
E arbitrator's finding and contrasting it with his subsequent reference to the definition of "partnership" under s. 2 of the Income Tax Act 1967:

> L. Nature Of The Relationship Between The Parties
>
> F 39. The Respondent submits that the transaction between the Claimant and the Respondent was never intended to and does not constitute a partnership between the parties. There can be no dispute about this. Indeed, clause 9 of the J.V. Agreement provides that nothing contained or implied in the
> G Agreement shall constitute or be deemed to constitute a partnership between the parties. Apart from this clause, joint ventures are not in law regarded as partnerships. There are however certain obligations that joint ventures owe to each other stemming from the fact that they are in a fiduciary relationship. This includes the obligation to act in good faith,
> H an obligation which is also underscored by the provisions in the J.V. Agreement which impose some specific obligations to act in good faith.

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[25] With that reasoning in the forefront of our mind, we then fast-forward to the learned arbitrator's finding on the income tax returns and again this must be set out *in extenso* so as to avoid any misreading and consequently a misinterpretation of the finding:

T. Income Tax Returns

85. The Claimant complains that the Respondent failed to file proper income tax returns pursuant to sec. 2 read with sec. 86 of the Income Tax Act 1967 and that this is a breach of its fiduciary duty to the Claimant.

86. *The question is: on whom does the obligation lie to file a tax return in relation to the joint venture which is not a partnership?*

87. The J.V. Agreement provides that for the computation of the total net profit after tax which then forms the basis for payment of the 35% due to the Claimant as consideration, the Respondent is to produce audited final accounts to be prepared on a yearly basis. It further provides by clause 10.1 that each party shall bear their own respective taxes payable in respect of the disposal of the Project Land and the proposed development of the Project Land and the Project.

88. The Income Tax Returns filed by the Respondent were produced after I ordered discovery of the same on the Claimant's application. These returns were filed solely in the name of the Respondent.

89. *The definition of a partnership in sec. 2 of the Income Tax Act 1967 is wider than that prescribed by sec. 3(1) of the Partnership Act 1961. Although the relationship between the Claimant and the Respondent is not a partnership, it is, for the purposes of the Income Tax Act 1967, regarded as one*. Sec. 2 defines partnership as including

> "(... joint adventurers, syndicates and cases where a party to the association is itself a partnership)" between parties who have agreed to combine any of their rights, powers, property, labour or skill for the purpose of carrying on a business and sharing the profits therefrom ...
>
> An annual return therefore has to be filed in the prescribed Form P in respect of the Project. (emphasis added)

[26] It was in the light of the above that the learned arbitrator came to the conclusion as follows:

> 92. The Claimant also asks that the Respondent now file Form P, in respect of the development from 2002. The Claimant is entitled to this being done, unless it lies within the power of the Inland Revenue Department that this need not be done and the Income Tax Department issues such a ruling.

[27] There was thus no confusion in the mind of the learned arbitrator and certainly no ambiguity when as part of the final orders that the learned arbitrator made, it was recorded as follows at p. 66 of the partial award:

> I Order that the Respondent provides the Claimant with copies of all income tax returns filed in respect of the development of the Project Land and further Order that the Respondent file Form P as prescribed in the Income Tax Act 1967 in respect of the Joint Development Accounts for the housing development in Larkin, Johor Bahru commencing 1.4.2002 until completion of the Joint Venture between the Claimant and the Respondent, unless it obtains a ruling from the Inland Revenue Department that this need not be done.

[28] Thus it can be clearly seen that whilst the JV is not a partnership, it was the arbitrator's finding that for the limited purpose of Income Tax submission, Form P is to be filed by the respondent unless it obtains a ruling from the Inland Revenue Department that this need not be done. Clarity of thought leads to clarity of speech and writing and I can see this in this speaking award. I cannot see how anyone can castigate the arbitrator's finding here as being confusing and indecisive. I see no reason to interfere with the learned arbitrator's finding.

[29] I also failed to see how this finding of the learned arbitrator supported as it is with cogent reasons can be said to be an award that has dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration within the meaning of s. 37(1)(a)(iv) of the Arbitration Act 2005. Neither can it be said to be an award that contains decisions on matters beyond the scope of the submission to arbitration under s. 37(1)(a)(v).

[30] Another complaint of Niche Properties is the finding of the learned Arbitrator that there had been a breach of trust on the part of Niche Properties with respect to the utilisation of the balance monies left in the HDA Account. Learned counsel for Niche Properties Mr R Suppiah submitted that if the JV is not a partnership then the question of breach of trust money does not arise as the Ministry itself had sanctioned the release of the monies to the general account of the developer Niche Properties.

[31] Upon a closer perusal of the relevant part of the partial award, the learned arbitrator was very clear in his finding as follows at para. 94:

> This withdrawal was therefore a legitimate withdrawal pursuant to and not in breach of the Housing Developers Act. *That does not however determine the position between the Claimant and the Respondent. The money so released by the Ministry was the balance of income received from the sales of the project and was the entitlement of both the Claimant and the Respondent.* (emphasis added)

[32] Learned arbitrator explained further the reasons for such a finding at paras. 95 and 96 of the partial award:

> 95. The Respondent's submission however is that
>
> > the Claimant chose to believe wrongly that the operating bank account is exclusively designated to manage the funds from the project. In fact the bank account is a general operations bank account for the Respondent.
>
> 96. I find that the Claimant was entitled to assume that the money in the account would not be used for purposes unconnected with the Project and it is the Respondent which had wrongly believed that it could treat this account as its general operations account. The sum of RM290,000 has been earned from the development *for the benefit of both parties and not the Respondent alone. It cannot be used for purposes unconnected with the joint venture relationship between the Claimant and the Respondent.* (emphasis added)

[33] It was in that context and for the above reasons that the learned arbitrator concluded at para. 96 of the partial award that "... It is a breach of trust on the part of the respondent to utilise money held for both parties for its own purposes."

[34] I see no reason to interfere with this finding and even if I am minded to come to a different conclusion or to express it differently, that by itself is insufficient reason for me to set aside the award. As the dispute of necessity revolves around accounting treatment, the learned arbitrator is perfectly entitled to make a finding of breach of trust if the facts are patent on the face of it. It cannot be said that the award has dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration or that the award contains decisions on matters beyond the scope of the submission to arbitration within the meaning of s. 37(1)(a)(iv) and (v) of the Arbitration Act 2005.

[35] In any event, on this issue *Taman Bandar Baru Masai*'s case, (*supra*) at p. 105, states:

> it is trite that the arbitrator has a general jurisdiction to deal with all matters relating to the dispute and this will cover incidental matters.

[36] The more expansive and extensive definition of an "arbitration agreement" under the 2005 Act justifies such a practical approach in promoting arbitration as a one-stop centre to resolve any and every dispute arising out of or under an Agreement. Section 9(1) of the 2005 Act reads:

> In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

[37] As can be seen the solutions to be provided by an arbitration under the 2005 Act are intended to be comprehensive and conclusive, full and final. The rather more restrictive definition of an "arbitration agreement" under the 1952 Act in s. 2 thereof "means a written agreement to submit present or future differences to arbitration, whether the arbitrator is named therein or not".

Whether There Was An Error On The Face Of The Award

[38] It was also contended that there was an error on the face of the award and as such the award must be set aside. There was nothing specified in the supporting affidavit of Niche Properties as to what these errors are. In any event the expression "error on

the face of the award" and the corresponding concept of "misconduct" belong to the old regime under the 1952 Act and the case laws that developed under it. Under the new regime of the 2005 Act, one must come within one of the grounds identified in s. 37(1)(a)(i) to (vi). Even assuming for a moment that the test of error on the face of the award is still applicable, learned counsel for Niche Properties have failed to identify these so-called errors.

[39] I can do no better than to quote what the Court of Appeal in *Crystal Realty Sdn Bhd v. Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791, as highlighted in *Taman Bandar Baru*, *supra* at p. 95 said:

> The final award of an arbitrator must be viewed in its totality and any error of law on the face of the award must be one that is patent and obvious as to render the award manifestly unlawful and unconscionable to subsist and, thereby, justify the award being set aside. On the facts of this instant appeal, there was no error of law on the face of the final award for the High Court to review. When an arbitrator does not accept any submission made by counsel with regard to any proposition of law, such act or conduct does not render the award infected with an error on its face. Clearly, there was no legal proposition by the arbitrator, forming the basis of the award, which was erroneous.

[40] I find that the learned arbitrator's partial award dated 30 April 2011 is a reasoned award carefully crafted after a comprehensive consideration of the pleadings, documents filed and after oral hearing of 13 days where both the claimant and the respondent called three witnesses each as well as after giving due consideration to the submissions of both parties. I fail to see any error on the face of the record that would constrain me to set aside the awards.

Whether The Award Is Against The Public Policy Of Malaysia

[41] Then there is the public policy ground under s. 37(1)(b) which this court has been invited to consider as a ground to set aside the award. The argument as set out by Mr R Suppiah goes like this:

> Any attempt to delay or derail the project would not be in public interest. The developer is responsible to the end buyers for the completions of the house units and eventual delivery of individual title to respective house buyers. This is an ongoing project and

A completely undertaken by the Respondent/Developer. Further the Respondent/Developer is a sole financial provider for the project. They have the expertise, financial resources, knowledge and proven track record and more importantly a Developer Licenses.

B The Claimant has no such responsibility at all. They do not even have a Developer License nor the financial means. The Claimant's only concern is with distribution of profits to them which incidentally is at the end of the projects.

C Therefore any attempt by the Claimant to frustrate the project will have serious repercussion and will not be in the interest of the public.

[42] With respect I fail to see how the award of the arbitrator can be said to be against the public policy of Malaysia. Surely if it is against the public policy of Malaysia then the respondent D should have raised this at the outset of the arbitration and not after the award had been given against the respondent. Is the respondent Niche Properties suggesting then that if the award had been in its favour then it would not be against public policy? There is nothing against public policy for the arbitrator to E adjudicate on the rights of the parties under the JVA even though the subject matter has to do with a housing development project. If the respondent is suggesting that with respect to execution of the award which is later to be enforced as a judgment of the court, then if it can show special and exceptional circumstance, it F may apply for a stay of execution. But that is different from saying that the award has to be set aside or that its registration and enforcement should be refused on ground that it is against public policy. If that were so then a landowner having a dispute with a developer under a JVA would have to postpone his claim until the G developer has completed and handed over all the units to the purchasers! That surely cannot be the law!

[43] It is not unknown for a developer to suffer winding-up before completion of its housing project and the liquidator H appointed will assess the viability of continuing to completion the project. It would be too far-fetched to say that to have a winding-up order made against a developer before it completes its housing project is contrary to public policy.

I

[44] The Singapore decision of *AJT v. AJU* [2010] 4 SLR 649 has this helpful explanation and exposition as to the subtance and scope of "public policy" under the *UNCITRAL Model Law* upon which the Singapore International Arbitration Act is based. His Lordship Chan Seng Onn J observed as follows:

> [14] Before considering the merits of [AJT]'s application, it is useful to first set out the relevant legal principles in relation to the setting aside of arbitration awards. Article 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") set out in the First Schedule of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") provides that an arbitral award may be set aside only if the court finds that the award conflicts with the public policy of the State. In *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] 1 SLR(R) 597, the Court of Appeal held at [57] *that errors of law or fact, per se, do not engage the public policy of Singapore* under Art 34(2)(b)(ii) of the Model Law. The Court of Appeal further stated [59]:
>
> > Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, *it should only operate in instances where the upholding of an arbitral award would 'shock the conscience'* (see Downer Connect...at [136]), or is '*clearly injurious to the public good or...wholly offensive to the ordinary reasonable and fully informed member of the public*' (see *Deutsche Schachbau v. Shell International Petroleum Co Ltd* [1987] 2 Lloyds' Rep 246 at 254, per Sir John Donaldson MR), or where it *violates the forum's most basic notion of morality and justice*: see *Parsons & Whittemore Overseas Co Inc v. Societe General de L'Industrie du Papier* (RAKTA) 508 F 2d 969 (2nd Cir, 1974) at 974. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law. As was highlighted in the Commission Report (A/40/17), at para 297 (referred to in A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at page 914):
> >
> > > In discussing the term "public policy", it was understood that it was not equivalent to the political stance or international policies of a State but

> comprised the fundamental notions and principles of justice ... It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside.

In *Sui Southern Gas Co Ltd v. Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1, Judith Prakash J reiterated the principle she enunciated at [17] of *VV v. VW* [2008] 2 SLR(R) 929 that assertions of breach of public policy cannot be vague and generalised. *The party seeking to challenge an award has to identify the public policy which the award allegedly breaches and to show which part of the award conflicts with that public policy.* Prakash J further cited PT Asuransi and stated that in order *for a plaintiff to succeed on the public policy argument, it has to cross a very high threshold and demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice.*

> [15] Thus, in order for [AJT] to succeed in setting aside the Award on the ground that upholding the Award would be in conflict with the public policy of Singapore, it has to establish, first, that the Tribunal decided erroneously on the issue of illegality of the Concluding Agreement. Next, it has to show that the error was of such a nature that enforcement of the Award would "shock the conscience", be "clearly injurious to the public good" or would contravene "fundamental notions and principles of justice". (emphasis added)

[45] Based on the above clear test of "public policy", I have no hesitation in rejecting this ground of trying to set aside the award.

Whether The Inherent Powers Of The Court Can Be Invoked To Set Aside An Award

[46] Niche Properties has alternatively relied on the inherent powers of the court to set aside the awards despite the specific statutory criteria set out in s. 37 of the Act which the plaintiff has failed to satisfy. I agree with learned counsel for the claimant that in these circumstances, the reliance on the inherent power of the court is misplaced and not applicable.

[47] In *Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors* [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244; [1988] 1 MLJ 178, the Federal Court set out the limits of O. 92 r. 4 RHC 1980 which provides:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

[48] The Federal Court held at p. 247 (CLJ), p. 181 (MLJ) as follows:

> We read this to mean that the rules cannot interfere with the exercise of the inherent powers by the court so long as it deems it necessary to prevent any injustice or an abuse of its own process. It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers.

[49] In this case, the legislature by the 2005 Act has provided for specific statutory criteria which the Niche Properties has failed to meet in attempting to set aside the award. Section 8 of the Act expressly states that "Unless otherwise provided, no court shall intervene in any of the matters governed by this Act." Hence there is no basis to resort to inherent powers.

Whether There Is A Place For 'Clarifications' Of The Awards Of The Arbitrator

[50] The respondent at para. 9 of its affidavit in exh. "YTC6" by a letter dated 26 March 2011 wrote to the learned arbitrator stating:

> We enclose herewith a list of further clarifications sought by our client for their benefit of understanding.

[51] I agree with learned counsel for the claimant that the respondent had only disclosed partially and selectively the said letter exh. "YTC6" without disclosing the following:

(a) The respondent's solicitors letter dated 28 June 2011 to the Arbitrator seeking the same clarifications marked as exh. "A9" in the claimant's affidavit (2);

(b) The claimant's solicitors letter dated 28 June 2011 to the arbitrator replying to the respondent's request for further clarification marked exh. "A10" in the claimant's affidavit (2);

(c) The arbitrator's letter dated 5 July 2011 requesting the defendant's solicitors to "specify which part of the dispositive section of the partial award at pp. 64 to 67 their client is unable to comply with" marked exh. "A11" in the claimant's affidavit (2).

(d) There was no reply by the respondent's solicitors to the said arbitrator's letter.

[52] In any event I am of the view that the issue of "clarifications" sought by the respondent is totally misplaced as there is no provision in the Arbitration Act 2005 or the UNCITRAL Rules which provides for "clarifications" of an award. Sections 35(1)(a) and (b) of the Act only provides for the arbitrator to correct any error in computation, any clerical or typographical error or other error of similar nature or interpretation of a specific point or part of the award. This was not what was sought by the respondent of the arbitrator.

[53] Section 35(1) of the Act states that the time to invoke the provisions of correction and interpretation of an award is thirty (30) days of receipt of the award and the respondent was out of time.

[54] In fact this matter as to whether an arbitrator has the power to clarify an award had already been addressed under the old regime of the Arbitration Act 1952 and the position has not changed under the Arbitration Act 2005. In *Teong Piling Co v. Asia Insurance Co Ltd* [1994] 2 CLJ 662 at p. 666; [1994] 1 AMR 7 at pp. 423-424 Edgar Joseph Jr SCJ (as his Lordship then was) opined:

> By way of postlude, I should like to advert to the fact that while this matter was still pending the solicitors for the defendant had by letter dated September 17, 1993, addressed to the Executive Secretary of Pertubuhan Akitek, Malaysia (PAM) sought clarification of the Arbitrator's order as to costs, without extending a copy thereof to the solicitors for the plaintiff. The solicitors for the defendant took strong objection to this. Be that as it may, that letter was passed on to the arbitrator Mr WY Chin who by a letter dated September 20, 1993, addressed to the solicitors for

the defendant gave them a breakdown as to how the sum of RM23,740 referred to in his award as "arbitrator's fees, expenses and disbursements" was arrived at.

This caused much annoyance to the solicitors for the plaintiff who gave expression to that annoyance by letters which they wrote to the solicitors for defendant, as well as to the arbitrator. These letters have been exhibited in an affidavit affirmed to by Mr Mahinder Singh of counsel for the plaintiff. The gist of counsel's objection was that once proceedings have been instituted in Court only the Court has power to remit the award to the arbitrator for clarification.

In my view, counsel's objection is well taken and I would add that the arbitrator being functus officio once his award had been published, would have no jurisdiction to give any clarification of the award he had made in the absence of the question being remitted to him by the Court.

I therefore have no hesitation in disregarding the entire correspondence I have referred to, including the letter of the arbitrator giving the clarification sought. Quite apart from the *functus officio* point, I subscribe to the view that often the worst person to construe words is the person responsible for their drafting. In this context, I am reminded that Lord Halsbury LC, indeed, once abstained from delivering a judgment on account of his responsibility for the Act in question, contenting himself with a warm concurrence with the welcome speeches of his brethren. This is how he put it in *Hilder v. Dexter* [1902] AC 474 at 477:

> I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps, it was not done. (emphasis added)

[55] Indeed in Sundra Rajoo and WSW Davidson, *The Arbitration Act 2005, UNCITRAL Model Law as Applied in Malaysia*, Sweet & Maxwell Asia, 2007 at p. 165, the learned authors took a similar view under the 2005 Act:

> 36.4 Section 36(2) confirms that the arbitral tribunal becomes *functus officio* upon making of an award. The arbitral tribunal's mandate terminates with a valid award. Section 36(2) adds that

A the arbitral tribunal then has no jurisdiction to vary, amend, correct, review, add to or revoke an award which has been made except as specifically provided for in section 35. Section 35 allows the arbitral tribunal to correct clerical or calculation errors, interpret the award, and also to make an additional award as to the claims presented in the arbitration proceedings but omitted from the arbitral award.

Enforcement Of The Award Under s. 38(1) Of The Arbitration Act 2005

[56] The claimant has applied to enforce the award under s. 38(1) of the Arbitration Act 2005.

[57] Section 38(1) of the Act provides as follows:

38(1) On an application in writing to the High Court, an award made in respect of a domestic award or an award from a foreign state shall, subject to this section 39 be recognized as binding and be enforced by entry as a judgment in terms of the award or by action.

[58] The claimant has also complied with the formal requirements of s. 38(2) by producing:

(i) the duly certified copies of the awards (exh. "A3" and "A4"); and

(ii) the duly certified copy of the agreement (exh. "A1")

[59] The claimant as plaintiff here submitted that the defendant's affidavit in reply in opposition to the plaintiff's application for recognition and enforcement of the awards is absolutely irrelevant and do not constitute justifiable grounds to refuse the plaintiff's application.

[60] As stated in s. 39(1)(a)(b) of the Act, the only statutory grounds for refusing recognition or enforcement of an award are where the party against whom it is invoked provides to the High Court proof that:

(i) a party to the arbitration was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) the award contains decisions or matters beyond the scope of the submission to arbitration;

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the High Court finds that:

(i) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

[61] As can be seen from the defendant's affidavit, none of the matters raised have any connection to the statutory grounds in s. 39 for refusing recognition or enforcement. As stated in Sundra Rajoo and WSW Davidson in *The Arbitration Act 2005, UNCITRAL Model Law as applied in Malaysia*, Sweet & Maxwell Asia, 2007 at p. 183:

> Recognition of awards under subsection (1) is mandatory if the formal requirements of section 38 are met but subject to the court's power to refuse recognition under section 39.

[62] For the reasons already given in the discussion on setting aside the award, none of the grounds in s. 39(1)(a)(i) to (vii) and 39(b) applies. There is no need to rehash the arguments all over again as they are essentially two sides of the same coin as was observed by Sundra Rajoo and WSW Davidson (*supra*) at p. 179 para. 37.40.

A

Pronouncement

[63] In the circumstances I had dismissed Niche Properties' application to set aside the award in originating summons 24NCC(ARB)-50-12/2011 with costs of RM10,000 to Kelana Erat. Consequently I also granted an order in terms of Originating Summons 24NCC(ARB)-43-11/2011 which is for Kelana Erat's application for enforcement of the awards dated 30 April 2011 and 27 October 2011 and that the said awards be recognised as binding and be enforced by entry as a judgment in terms of the awards. There shall be no order as to costs for this application as costs had already been granted in the setting aside application seeing that the arguments are essentially two sides of the same coin.

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